Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 2000

ISIDRO SAMUEL REYES,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTION PRESENTED FOR REVIEW

(1) Whether an accused in a criminal trial is denied his Sixth Amendment right to a trial by an impartial and informed jury when the last "hold out" juror decides to vote guilty, not based on the evidence at trial, but based upon the result from flipping a coin?

LIST OF PARTIES

1. People of the State of California
2. Isidro Samuel Reyes

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OPINIONS BELOW

There was no written opinion of the Superior Court of the State of California, County of Los Angeles. The unreported decision of the Court of Appeal for the State of California, Second Appellate District, Division Three appears in Appendix A to this Petition. The unreported Order of the Supreme Court of the State of California denying review appears in Appendix B to this Petition.

BASIS OF JURISDICTION

The California Supreme Court denied Petitioner's Petition for Review on April 26, 2000. This Court's jurisdiction is invoked under 28 U.S.C. S. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment; United States Constitution, Fourteenth Amendment; California Evidence Code, § 1150 (a); California Code of Civil Procedure, § 657 (2); and California Penal Code, § 1181 (4); all set forth in Appendix C.

STATEMENT OF THE CASE

Petitioner, Isidro Samuel Reyes, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California, Second Appellate District, Division Three, affirming Isidro Samuel Reyes' conviction, to allow this Court to determine whether a verdict arrived at after one juror changed its vote from not guilty, after flipping a coin and having it show "heads" two consecutive times, violates his right to a jury trial by an impartial jury based upon the evidence, guaranteed by the Sixth Amendment.

As relevant herein, on October 20, 1994, appellant was charged with possessing cocaine base for sale (Ca. Health & Saf. Code, §§ 11351.5) in an amount in excess of 14.25 grams (Ca. Pen. Code, § 1203.073 (b)(5)), after previously being convicted of a violation of California Health & Safety Code, section 11351. (Ca. Health & Saf. Code, § 11370.2, (a)) (CT 31-32) In Petitioner's first trial the jury was unable to reach an unanimous verdict. (CT1/52)[1]

Petitioner's second trial commenced on November 1, 1995 (RT 115), the jury began deliberating at 3:15 pm on November 7, 1995 (CT 69), and it announced its verdict of guilty in open court on November 9, 1995, around 3:00 pm. (CT 112; RT 602) After Petitioner waived a jury trial on the validity of the prior conviction (CT 112), the court found the prior conviction allegation true. (RT 654)

On June 27, 1996, Petitioner was sentenced to a total of seven years; the mid term of four years for possessing cocaine base for sale, and three years, consecutive, for the prior drug conviction. (CT 192; RT 663) Petitioner filed his timely notice of appeal on July 1, 1996. (CT 204) On October 30, 1997, the Court of Appeal filed its initial opinion; the remittitur was recalled and the opinion was vacated on December 22, 1999. On January 11, 2000, Division Three of the Second Appellate District filed its opinion (Appendix A), and denied Petitioner's timely motion for rehearing on February 1, 2000. On April 26, 2000 the California Supreme court denied Review. (Appendix B)

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[1] "CT" will be used here, and hereafter, to refer to the Clerk's Transcript on appeal; "RT" will be used hereafter to refer to the Reporter's Transcript on appeal; "AOB" will be used hereafter to refer to Petitioner's opening brief; "Pet." will be used hereafter to refer to Petitioner's Petition for Review; and "CO" will be used to refer to the Opinion of the Court of Appeal.

JUROR MISCONDUCT/MOTION FOR NEW TRIAL

After the jury retired for deliberations on November 7, counsel for both sides waived their appearances for reading testimony back to the jury[2] (CT 69, 71); testimony was read to the jury at 3:11 pm on November 8, pursuant to jury request. (CT 73; RT 601) While both the minute order and the reporter's transcript indicate that the jury announced its verdict in open court on November 9, 1995, around 3:00 pm (CT 112; RT 602); neither document reflects when the jury actually reached its verdict.

In his motion for new trial Petitioner learned that one juror, juror F., that had consistently voted not guilty, flipped a coin to determine whether he would continue to vote what he believed the evidence proved, or vote "guilty." (RT 617-20) Because the coin twice landed on "heads," F. changed his vote to guilty. (RT 618-19)

The only first hand knowledge regarding the timing of the final jury vote was provided by juror F. The prosecutor tried to get juror F. to say the jury deliberated from after lunch (approximately 1:30 pm) until 3:00 pm, but juror F. did not follow the suggestion in the leading questions; instead, juror F. said the jury waited in the jury room until 3:00 pm to announce its verdict.[3] (RT 622) Juror F.'s answer was clarified when Petitioner's counsel asked F. what happened

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[2]This waiver of presence for reading back testimony to the jury meant counsel were not waiting in court for the jury verdict; instead, they were "on call" to the court.

[3]Prosecutor "Q. All right. Mr. F, but for about an hour and a half after coming from lunch, after returning from lunch, discussion still continued in the jury room. There were still deliberations in the jury room for another hour and half after you came in from lunch; right? ¶ A. We were in there, but the decision was made. The decision was practically made before we even went to lunch. ¶ Q. But you still deliberated for an hour and a half after returning from lunch; is that right. ¶ A. We were in there, yes sir." (RT 622)

when F. returned from lunch. Juror F. testified that paper was passed out, and the jurors voted, without any discussion regarding guilt or innocence.[4] (RT 625) Therefore,[5] it is clear that the jury returned from lunch, voted, informed the court it had a verdict, then waited for counsel to arrive to announce the verdict in open court.

When juror F. flipped the coin to determine how he would vote, the result of the "flip" was to be verified two out of

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[4]Defense counsel "Q. After you flipped the coin, sir, did you — when you went back in the jury room, did you tell them you had changed your vote from not guilty to guilty? ¶ A. I told them at the time, I said, 'I'm going to go along with the flow, but I don't like my choice of what I'm going to —' because I never thought he was guilty because of the evidence. ¶ The Court: It really doesn't matter what he told the other jurors. ¶ Defense Counsel: I understand. Q. Did you do that as soon as you got back, what [sic] from lunch about 1:30? ¶ A. Soon [sic] we got back from our lunch break, everybody went back in the assembly room, and that's when they started passing the paper out. ¶ Q. Was there any discussion about guilt or innocence or did you just vote? ¶ A. We had just voted then. (RT 624-25)

[5]Appellant's trial counsel filed a declaration where he stated the jury deliberated until 3:00 pm. (CT 116) It appears this was a misstatement; he meant to say the jury announced its verdict at 3:00 pm. Counsel could not have had personal knowledge of this fact as he was not in the jury room to observe when anything happened. Therefore, the remark was either a misstatement, or based upon an unknown hearsay source. In any event, the trial court did not base its decision on counsel's conclusions in the declaration, it based its decision of what juror F. said under oath. (RT 615-16)

three times,[6] by either "heads" or "tails" appearing twice on his coin.[7] (RT 619-20)

When the motion for new trial for juror misconduct was argued and decided on April 25, 1996, the prosecution conceded that if juror F. flipped a coin and he used the coin flip to determine his verdict, Petitioner was entitled to a new trial. (RT 632) The prosecutor, however, argued juror F. was not a credible witness (RT 633) because there was evidence juror F. deliberated for an hour and a half in the afternoon, relying on the minute order for November 9,

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[6]Prosecutor "Q. If the coin landed on heads, what were you going to do? ¶ A. My original plan was heads he's guilty; tails he's not. And it land on heads. ¶ Q. Now, what would you have done if the coin had landed on tails for not guilty? ¶ A. I would have done what I normally do any time I have a problem of making what I call a corporate decision. ¶ Q. A corporate decision? ¶ A. Yes. A decision meaning not being biased. So I flipped a coin again. ¶ Q. You mean you would have flipped the coin as many times as you felt necessary? ¶ A. I did it a second time, and it came out heads again. But to answer your question, if it would have come out tails, then I would have had to flip it a third time to have a final decision to even it out. ¶ Q. So if it had come out tails, you would have flipped the coin at least three times before you would have done what? ¶ A. Before I would have had a decision that I went with, yes. ¶ Q. When you flipped the coin the first time, what happened? ¶ A. The coin landed on heads. ¶ Q. And that would be guilty; right. ¶ A. That was guilty. ¶ Q. But you went on to flip it a second time, right? ¶ A. Yes, I did. ¶ Q. Why did you flip it a second time? ¶ A. A [sic] flipped a coin a second time, because I was not satisfied with a guilty. My whole thing was I never thought he was guilty to begin with. ¶ Q. So when you flipped it the second time, what happened? ¶ A. When I flipped it the second time, it came out heads again, meaning that he was guilty due to the coin. ¶ Q. Did you stop there? ¶ A. Yes, I did. ¶ Q. Now, as I said, if it had come out tails the first time, you would have flipped it a second time and a third time? ¶ A. Probably followed the same procedure."

[7]"[I]t was 25 cents that had got them to give me [sic] a different — for me to give a verdict against what I really believed that had happened." (RT 624)

1995.[8] (RT 633-34) However, the minute order only established when the jury announced its verdict in open court.

To reach its decision, the trial court accepted juror F's testimony; it did not make a credibility call against him.[9] (RT 641-42; see also 650-51) Based on this the evidence showed there were no "deliberations" the afternoon of November 9, after the jury returned from lunch; the jury immediately voted and juror F. changed his vote to guilty, based upon the flip of the "quarter" over the lunch break.

ISSUE RAISED IN STATE COURTS

After the jury verdict, and during the proceedings on the motion for new trial, Petitioner raised the Sixth Amendment jury trial issue presented here.[10] (RT 631) This trial court upheld the "coin flip" verdict by juror F., concluding it could not consider juror F's testimony.[11] (RT 642) Petitioner against raised the Sixth Amendment issue in his

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[8] "The minute order on the last day, when the verdict was rendered, indicates that the verdict was reached at three o'clock in the afternoon."

[9] "The facts are — I'm willing to accept for purposes of this analysis that Mr. F. flipped a coin. Okay. I'm willing to accept that for purposes of the analysis. ¶ I don't think it makes a difference to the outcome of this conclusion. I'm not deciding this on lack of credibility of Mr. F. I'm saying, as a matter of law, we cannot upset the verdict on this evidence."

[10] "[T]o deprive Mr. Reyes his to be a free man based on a coin flip, I think, is against the State law. The Constitution of the United States, the Constitution of the State of California mandates that Mr. Reyes be given a new trial."

[11] "I don't think it makes a difference to the outcome of this conclusion. I'm not deciding this on lack or credibility of Mr. Fareed. I'm saying, as a matter of law, we cannot upset the verdict on this evidence."

motion for reconsideration.[12] (CT 168, 169, fn.2) The trial court again denied the motion.[13] (RT 649)

Petitioner raised the Sixth Amendment issued in his opening brief on appeal.[14] (AOB 3) The Court of Appeal concluded that one juror using a coin flip to decide his vote did not constitute "a chance verdict or one determined by lot." (CO 11; See Appendix A) Finally, Petitioner raised the Sixth Amendment question in his petition for Review to the California Supreme Court.[15] (Pet. 13) Therefore, the issue is preserved for this Court.

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[12] "The right to jury trial in criminal cases, guaranteed in state proceedings by force of the Fourteenth Amendment, *Duncan v. State of Louisiana,* 391 U.S. 145 (1968), encompasses the right to trial by *an impartial* jury. U.S. Const. Amendment. VI. Please see argument III below."

[13] "This really appears to me to be a matter of first impression in terms of the law. All of the misconduct and chance cases that I have ever located and read had to do with more than one individual being involved in selecting a verdict because of a flip of a coin or something. ¶ I have never located it, and could not, and counsel have not brought to my attention a case where a single individual juror say after the fact that, 'I changed my mind. I made up my mind based on my flipping of my coin in the process.' ¶ That if the code section 657.2 means what you've said, Mr. Beswick, then it's, in my opinion, in direct conflict with other code provisions about how you impeach a verdict. And it's not consistent my analysis. ¶ I do not think either as a matter of law or a matter of policy that a single individual juror can flip a coin and come out and say, 'I really didn't make up my mind. I didn't mean it when I said it. I flipped it,' and therefore file an affidavit and kick out an entire verdict. I do not think that is what is intended by this point 2 section."

[14] "The right to jury trial in criminal cases, guaranteed in state proceedings by force of the Fourteenth Amendment, *Duncan v. State of Louisiana,* 391 U.S. 145 (1968), encompasses the right to trial by *an impartial* jury. U.S. Const. Amendment. VI."

[15] "Appellant also has the right to an informed jury verdict, based upon the evidence instead of bias, 'chance,' or 'lot,' under the Sixth Amendment to the United States Constitution."

REASON FOR GRANTING THE WRIT

THIS COURT HAS NOT DECIDED WHETHER A VERDICT ARRIVED AT AFTER ONE JUROR FLIPS A COIN TO DETERMINE HIS VOTE, AND CHANGES HIS VOTE AS DETERMINED BY THE COIN FLIP, DENIES AN ACCUSED HIS RIGHT TO AN IMPARTIAL JURY VERDICT BASED SOLELY UPON THE EVIDENCE.

This case presents the question whether a verdict arrived out by a juror flipping a coin, and then voting as dictated by the result of the coin flip, denies the accused in a state criminal proceeding his right to a verdict by an impartial and informed jury, based upon the evidence presented, under the Sixth Amendment to the United States Constitution.

Although this trial was in the California courts, it is clear that Petitioner's trial had to conform to the dictates of the Sixth Amendment to the United States Constitution. (*Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S. Ct. 1444 (1968)) The most elementary duty of each juror is to listen carefully, follow the trial proceedings and to evaluate the strengths and weaknesses of the evidence and arguments adduced by each side so that the juror's ultimate determination of the factual issues presented is based on the strongest foundation possible. Otherwise, accused individuals are deprived of the complete, thoughtful consideration of the merits of their cases, which they are constitutionally entitled to. (Cf. *Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639 (1961); *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 411,[16] relying upon Amendments Six and Seven of the United States Constitution.)

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[16] "We agree with the basic premise that a jury's failure to pay attention to the evidence presented at trial is a form of misconduct which will justify the granting of a new trial if shown to be prejudicial to the losing party. (See Code Civ. Proc., § 657, subd. 2.) The duty to

This right to an informed verdict, based upon the evidence presented in court, would seem to exclude verdicts in criminal matters based upon non rational considerations such as bias, lot, or chance. However, while such verdicts have been discussed by this Court, Petitioner has not been able to find an opinion of this Court directly deciding this point. (See *McDonald and United States Fidelity and Guaranty Company v. Pless,* 238 U.S. 264, 268-69, 35 S. Ct. 783 (1915); cf. *United States v. Marques,* 600 F.2d 742, 746 and fn. 2 (9th Cir. 1979))

A juror that does not base its decision on the evidence produced at trial is not serving as a juror. Like a juror that sleeps through testimony and therefore has no knowledge on which to make an informed decision, a juror that relies on the flip of a coin[17] for a decision is making an uninformed decision. (Cf. *Tanner v. United States,* 483 U.S. 107, 125, 107 S. Ct. 2739 (1987)); and *Hasson v. Ford Motor Co., supra,* 32 Cal.3d at p. 411.)[18]

Here, under California law, as determined by the Court of Appeal, the testimony of juror F. was admissible and was required to be considered by the trial court. Moreover, the trial court credited the testimony of juror F. Nevertheless,

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listen carefully during the presentation of evidence at trial is among the most elementary of a juror's obligations. Each juror should attempt to follow the trial proceedings and to evaluate the strengths and weaknesses of the evidence and arguments adduced by each side so that the jury's ultimate determinations of the factual issues presented to it may be based on the strongest foundation possible. Were the rule otherwise, litigants could be deprived of the complete, thoughtful consideration of the merits of their cases to which they are constitutionally entitled. (U.S. Const., 6th & 7th Amends.; Cal. Const., art. I, § 16.)"

[17]Here, an evidentiary hearing was held and the trail court accepted as true the statement the juror based his verdict on a coin flip. Further, the Court of Appeal concluded that this evidence should have been considered by the trial court.

[18]See footnote 16, *supra.*

the Court of Appeal concluded that a verdict based upon the flip of a coin was a valid verdict. This Court should take this opportunity to resolve this question discussed but not previously decided by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the decision of the Court of Appeal of the State of California, that a verdict obtained after a juror changed its vote because of the flip of a coin, was a valid verdict in a criminal matter.

Dated: July 24, 2000

Respectfully submitted,

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